IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 45 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

S.P.SHARMA,INSPECTOR (PREVNT.)

Versus

KANIRAM S/O.LALAJI BANJARA

Appearance:

1. Criminal Appeal No. 45 of 1993
MR YATIN SONI for Appellant/Org.Complainant
MR MJ BUDDHBHATTI for Respondent No. 1
MR BY MANKAD APP for Respondent No. 2

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 07/08/2002

CAV JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

#. Original complainant Shri S.P. Sharma, the Inspector (Preventive) Central Bureau of Narcotics, Office of the Deputy Narcotics Commissioner, Neemuch, Madhya Pradesh has by preferring this appeal under Section 378 (4) of the Criminal Procedure Code, 1973 (for short "Cr.P.C.") challenged the correctness and legality of the judgement Ex. 79 dated 24.1.1992 rendered by the learned Sessions Judge, Banaskantha District, Palanpur in Sessions Case No. 173/90 by which, original accused i.e. present respondent No. 1 was ordered to be acquitted by giving benefit of doubt from the case, in which, charge was framed against him for an offence punishable under Section 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act").

#. The facts leading to this present appeal in nutshell are as follows :-

2.1 The complainant Shri S.P. Sharma was, at relevant point of time, serving as Inspector (Preventive), Central Bureau of Narcotics, Office of the Deputy Narcotics Commissioner, Neemuch (M.P.) received an information on 2.6.1988. He took down that information on paper. It was signed by panch witnesses and other officers of the department of the complainant. Copy of the said information was sent to the Higher officers of the Department. A raiding party was constituted under the leadership of complainant and other officers of the department. It is the case of the prosecution that complainant is an empowered officer under Section 42 of the NDPS Act to search and seize the contraband articles under the NDPS Act. The information, which was received by the District Opium Officer was to the effect that some persons of Banzara community from Mandsaur District and near about places of Madhya Pradesh were going to sell opium at Deesa in Gujarat.

2.2 In connection with that information, the said raiding party reached Deesa on 4.6.1988. The members of the raiding party were keeping watch at railway crossing No. 30 on Kachha Route Luharwada- Vadaval villages (Deesa), on 04.06.1988.

2.3 On 06.06.1988 during watch, two persons were seen coming in suspicious circumstances from Luharvada village side, about one and half furlong away from the Railway crossing No. 30. Seeing the preventive party, both

retreated to runaway. The members of the raiding party chased that two persons. Out of two persons one was caught hold of by them and another person managed his escape good. Person who was caught hold of by the members of the raiding party inquired from him about his name and address. That person gave his name to be Kaniram S/o. Lalati Banjara, resident of village Chayan, Tehsil Neemuch, Dist.: Mandsaur, Madhya Pradesh. He is respondent no. 1 in this appeal. Thereafter, Inspector (Narcotics) asked that person as to whether he wanted to give his search before the Magistrate or any Gazetted officer. The suspect i.e. respondent no. 1 voluntarily offered himself and told that the search of his bag might be taken by the Narcotic staff. It is the case of the prosecution that two bags were found hanging over the shoulder of the respondent No. 1. The members of the raiding party as per their case after observing all legal formalities in presence of two panch witnesses conducted search of the bag of the accused, which was with respondent no. 1. On searching of aforesaid bags, it was found with elastic substances which was kept in two rexine bags duly packed. Both the rexine bags were opened and black elastic substance was found therein, and it was smelt and tasted by the witnesses and the members of the raiding party. It was found to be opium. On being asked, the respondent no. 1 admitted the ownership of bag from which the opium was recovered. Further, the respondent no. 1 disclosed that in one bag out of two bags containing opium is of his companion whose name is Bhikha S/o. Ratna Banjara, village Lodakheda, Tehsil Narayangarh, Dist.: Mandsaur, (M.P.). The respondent no. 1 also informed that this opium was brought by them from Neemuch (M.P.) area to sell in small quantity to addicts in Deesa area of Gujarat State. The opium recovered was weighed in presence of the panch witnesses and the respondent no. 1. It was found that it was weighing about 6.00 Kg. in one rexine bag and 2.600 Kgs. in another rexine bag. Thus, total quantity of 8.600 Kgs. net opium was recovered and seized from the respondent no. 1 under a panchnama. It is the case of the prosecution that respondent no. 1 had no pass, permit or licence to possess the said opium.

2.4 It is the case of the prosecution that two samples each of 30 grams approximately from two rexine bags opium recovered, were drawn. Thus, in all four samples separately were drawn for chemical analysis and remaining opium was kept in the same manner in white cloth packet. Remaining opium and samples were sealed separately in presence of two independent witnesses, accused - Kaniram and members of the raiding party on the

spot. All the papers were prepared at the spot. The accused Kaniram was informed of for his arrest for contravention of Section 8 of the NDPS Act, which is punishable under Section 18 of the NDPS Act. Accused Kaniram was arrested there and then his other belongings were also seized for want of evidence. All the seizure formalities were completed on the spot in presence of two independent witnesses, the accused and the members of the raiding party.

2.5 After completion of seizure formalities, Inspector (Narcotics) came at Deesa (Rural) police station alongwith seized opium, samples and accused, in company of all the members of the raiding party. Inspector (Narcotics) lodged his FIR of the case against accused Kaniram. He deposited seized opium, two samples and other seized articles at Deesa (Rural) police station. Out of four samples, two samples were kept in personal custody of the Inspector for being sent to Government Opium and Alkaloid Works, Neemuch (M.P.) for chemical analysis as per departmental procedure. He obtained receipt from the Deesa (Rural) Police Station for the above articles deposited by him. He informed the departmental officers of Narcotics Department, as per Section 57 of the NDPS Act.

2.6 Two samples out of four samples drawn out from opium seized from accused remained in personal custody of the Inspector (Narcotics) from the time of lodging FIR, till he returned to his head quarter i.e. upto 09.06.1988. Said two samples were handed over to the District Opium Officer, Neemuch III Division as soon as the Inspector reached head quarters for keeping them in safe custody and also for doing needful in the matter. The District Opium Officer, Neemuch III Division sent these samples to Govt. Opium and Alkaloid factory Neemuch vide his covering letter dated 10.6.1988, which was received by Responsible Officer of the said factory, on 10.6.1988. The Assistant Chemical Examiner, after testing both the samples in laboratory of opium factory Neemuch opined the same to be opium vide his Report No. 8047 dated 21.07.1988. It is the case of the prosecution that said substance seized from the accused was opium within the meaning of Section 2 (XV) of the NDPS Act.

2.7 The complaint, which was lodged by the complainant in Deesa (Rural) Police Station came to be registered as CR No. Prohi. 77/88. After registering the said complaint, the investigation of the crime started to be conducted by the complainant himself as he was authorised under the Notification under Sections 53

and 67 of the NDPS Act. Before apprehending the accused, the complainant had recorded a statement of the accused under Section 67 of the NDPS Act. It is the case of the prosecution that Kaniram has committed an offence punishable under Section 8 read with Section 18 and 23 of the NDPS Act.

2.8. For the very same facts of the case, the complainant also filed his complaint being a private complaint in the Court of the Sessions Judge, Banaskantha at Palanpur on 27.11.1990. The learned Sessions Judge, Banaskantha at Palanpur took a cognizance of an offence and registered that complaint as Sessions Case No. 173 of 1990. The complainant had also produced the list of seized articles at Ex. 2, list of witnesses at Ex. 3 and list of documents at Ex.4 alongwith said private complaint. The concerned Police Station of Deesa (Rural) Police Station produced all the muddamal articles under a list Ex.6 in the Court of the learned Sessions Judge, Banaskantha, Palanpur.

#. The learned Judge of the trial Court framed charge Ex. 7 on 21.1.1991 as if the case is filed on the basis of chargesheet filed by the police. Plea of accused at Ex. 8 was recorded, wherein, accused pleaded not guilty to the charge and he claimed to be tried. Thereafter, it was brought to the notice of the learned Sessions Judge that said case was instituted on the basis of a private complaint lodged by the complainant. Hence on 24.7.1991 the learned Judge of the trial Court passed an order Ex.16 treating charge Ex.7 as cancelled. Thereafter, the prosecution examined complainant at Ex. 17. He tendered certain documents during the course of recording of his oral evidence. On the basis of oral evidence of complainant and documentary evidence produced by him, the learned Judge of the trial Court framed charge at Ex. 24 afresh on 24.7.1991. Again plea of accused was recorded below Ex. 23 on 24.7.1991. The accused pleaded not guilty to the charge and he claimed to be tried.

#. The prosecution examined following witnesses in support of the case, for which charge has been framed against the accused.

(i) PW-1 Shantilal Sukhlal Yadav (complainant) Ex. 17.

(ii) PW-2 Nava Kalu (Panch witness) Ex. 36.

(iii) PW-3 Dalabhai Narsingbhai Jasalia, (Writer Head Constable, serving in Deesa (Rural) Police

Station) Ex. 37.

(iv) PW-4 Aabadkhan Gulabkhan Parmar (Police Constable), who carried with him the muddamal articles from Deesa (Rural) Police Station to Sessions Court, Palanpur Ex. 40.

(v) PW-5 Police Head Constable Chhotalal Laghuram (who was PSO in Deesa (Rural) Police Station on 06.06.1988) Ex. 45.

(vi) PW-6 Dineshwariben Gajanan Barot, (who was PSO in Deesa (Rural) Police Station. She put up accused Kaniram in police lock up) Ex. 51.

(vii) PW-7 Shantaprasad Shrigopal Chaudhari. (He took down information received by the District Opium Officer, Neemuch) Ex. 54.

(viii) PW-8 Balusinh Kajorsinh Ranavat. (He carried with him the two samples of muddamal articles and handed over to Responsible officer of Laboratory for analysis) Ex. 61.

(iv) PW-9 Surendraprasad Kashiprasad Sharma. (He was one of the members of the raiding party) Ex. 63.

#. The prosecution also produced following documentary evidence, alogwith other documents in support of their case against the accused :-

(i) Complaint Ex. 1

(ii) Panchnama Ex. 10.

(iii) Written information given to accused giving grounds of his arrest Ex. 20.

(iv) Report of Chemical examiner Ex.21.

(v) Copy of entry No.14 dated 06.06.1988 from the station diary of Deesa (Rural) Police Station stating interalia the short summary of complaint Ex. 50.

(vi) State of accused Kaniram recorded by complainant on 06.06.1988 which at mark 4/14.

#. On completion of oral evidence being recorded, the circumstances appearing against accused were brought to the notice of and explained to accused. In his further

statement recorded under Section 313 of the Cr.P.C., the accused has denied practically the entire case of the prosecution. In answer to question No. 15, put to him, he has stated in his further statement that since two to three years, before he was arrested, he was doing the manual labour work in field at Vadaval and that appellant had arrested however to question No. 15, put to him, he has stated in his further statement that since two to three years before he was arrested, he was doing the manual labour work in the village Vadaval and that appellant had arrested him from the field at Vadaval. He also submitted his written statement, which is at Ex. 70. Accused has stated interalia in his written statement at Ex.70 that he is an innocent person. It is further stated that it is false that he was arrested alongwith opium near railway crossing in between village Lorvada and Vadaval. He did not go to the said place alongwith opium. No opium was found from his possession. Since three years before the date of incident, he was doing an agricultural labour work in village Vadaval. He was arrested by an officer of M.P. from the field of village Vadaval. At the time of arrest, he informed his name and name of his village to that officer. He was not arrested by said officer from the place near railway crossing. That officer have not recorded his statement. After arresting him from the field of village Vadaval, he was produced in the Deesa (Rural) Police Station. Thereafter, after hearing the arguments of the learned advocates for both the parties and after analysing and appreciating the oral as well as documentary evidence, the learned Judge of the trial Court came to a conclusion that prosecution has totally ailed to prove the case against the accused and therefore, by rendering his Judgement Exh.79 dated 24.1.1992, he acquitted the accused by giving him benefit of doubt.

#. Being aggrieved against and dissatisfied with the said judgment of acquittal, the original complainant has preferred this present appeal as per the provisions of Section 378 of the Cr.P.C. by seeking necessary leave of this Court.

#. We have heard Shri Yatin Soni, learned Additional Standing Counsel for the Central Government, who is appearing for the appellant, Shri J.M. Buddhbhatti, learned advocate for the respondent no. 1 and Shri B.Y. Mankad, learned APP for the respondent no. 2 - State of Gujarat. Shri Yatin Soni, learned advocate for the appellant has taken us through oral as well as documentary evidence together with impugned judgement challenged in this appeal.

#. Shri Yatin Soni, learned advocate for the appellant has argued that learned Judge of the trial Court has misread the evidence and wrongly come to the conclusion that the prosecution has failed to prove the case against accused. He has argued that on reappreciation of evidence by this court, appeal deserves to be allowed and judgement of acquittal is required to be set aside. He has further argued that looking to the nature and seriousness of the offence, the learned Judge of the trial Court ought to have appreciated the evidence correctly in its proper perspective and he ought to have held that the case is proved against the accused. He has submitted that complainant has proved his case against the accused beyond reasonable doubt and therefore, accused should be convicted with adequate sentence, after allowing this appeal. Shri B.Y. Mankad, learned APP for the respondent no. 2 State has supported the arguments of Shri Yatin Soni. Shri J.M. Buddhbhatti, learned advocate for the appellant no. 1 has supported the judgement of acquittal rendered by learned Judge of the trial Court. He has argued that looking to report of the Chemical Examiner, which is a base for conviction, cannot be admitted in evidence as the Chemical Examiner has not stated the data and result of analysis. He has further argued that mere opinion is not sufficient to accept that report as an admissible evidence. In support of his arguments, he has placed reliance on two cases. (i) MAHMAD HANIF SHAIKH IBRAHIM VS. STATE OF GUJARAT, reported in 1994 (2) GLR XXXV (2) p.1191. and (ii) AMRABHAI RANCHHODBHAI BHARWAD VS. STATE OF GUJARAT, reported in 2001 (2) GLR Vol.XLII (2) p. 1140. Both the decisions are of Division Bench of this Court.

##. On making scrutiny of the impugned judgement, which is challenged in this appeal, it appears that learned judge of the trial Court has acquitted the accused mainly on following four counts.

(i) From the evidence of Surendraprasad Kashiprasad Sharma Ex. 63, it appears that representative samples of muddamal articles were packed by wrapping in piece of paper and that piece of paper was kept in empty packet of cigarette and they then wrapped that empty packet of cigarette in a piece of paper. As against this, report of the Chemical Examiner Ex. 21 speaks that representative samples of muddamal articles were found kept in empty match box, which was wrapped in polythene sheet. Considering this a quite contrary evidence for muddamal articles, a

reasonable doubt arises and because of that reasonable doubt, accused should be given benefit of doubt.

(ii) It is the case of the prosecution that when bag of accused was searched, the total quantity of opium was found to be 8.600 grams. It is the case of the complainant that four representative samples each of 30 grams had been prepared and therefore, if actually opium weighing 120 grams was taken out from that bulk of opium weighing 8.600 grams naturally, the remaining opium be weighing would be 8.480 grams. Now, it is the case of the prosecution that complainant produced opium in packet weighing 8.600 grams in the police station. Thus, variation in the weighing of muddamal articles creates a doubt that samples were taken from some other substance other than, opium weighing 8.600 grams.

(iii) The complainant, who carried out the search and seizure was neither an empowered officer nor authorised officer as per Section 41 (2) of the NDPS Act. Complainant is not empowered by the Central Government to act under the provisions of Section 41 (2) of the NDPS Act and therefore, the search and seizure is illegal and same vitiate the trial resulting into acquittal of the accused.

(iv) On one side, the complainant lodged his complaint in Deesa (Rural) Police Station by keeping investigation suo-motu, with him and therefore, this is a police case and law requires that P.I. of Deesa (Rural) Police Station ought to have filed chargesheet against accused in the trial Court. As against this legal procedure, the complainant has adopted a curious mode by lodging a private complaint in the trial Court and therefore also, the trial is vitiated.

##. In case of STATE OF GUJARAT VS. SUBAMIYA, reported in 1980 GLR p. 587, certain guiding principles governing the exercise of the High Court's appellate jurisdiction are enunciated. Paragraph 10 of the said judgement reads as under :-

" Before we proceed to consider the evidence led by the prosecution, we were very much conscious of the fact, that the decision under challenge was one which had resulted in the acquittal of

the accused person. The guiding principles governing the exercise of the High court's appellate jurisdiction are well settled. The Appellate Court, while dealing with an appeal against the order of acquittal has full power to review at large the evidence on which the order of acquittal is founded, and to reach a conclusion that upon such evidence, the order of acquittal should be reversed. However, in exercising its powers the appellate Court should give proper weight and consideration to such matters as (i) the views of the trial Court as to the credibility of the witnesses. (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused to the benefit of any doubt; and (iv) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses which finding would not certainly be disturbed, if two reasonable conclusions can be reached on the basis of the evidence on record."

It is also held in case of STATE OF GUJARAT VS. JERUBHAI FULJIBHAI, reported in 1994 (1) GLR p.29, wherein, in paragraph 4 it is held as under :-

"Before dealing with the contentions raised by Mr. S.T. Mehta, learned counsel for the State, it is pertinent to bear in mind the basic principles applicable to appeals from orders of acquittal. It is by now a well settled principle of law that the appellate Court should not only be slow and cautious, but must be also reluctant to interfere with the orders of acquittal unless it can be made out that the impugned judgement and order of acquittal is a perversity in law or that the same is based on a gross misappropriation of evidence or is a case of total non-application of mind. It is also required to be borne in mind that when the appellate Court agrees with the general appreciation of evidence as found by the trial Court, no detailed reappreciation of such evidence is required and no elaborate reasoning needs to be given. This principle has been reiterated in the decision of the Supreme Court in case of STATE OF KARNATAKA VS. HEMAREDDY, reported in 1981 SC p.1417 (para 6)."

In case of RAMESH BABULAL DOSHI VS. STATE OF GUJARAT, reported in 1997 (1) 38 (1) GLR p. 307 (SC), wherein in para 7, it has been held by the Apex Court as under :-

> "..... This court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusion arrived at by it were wholly untenable. While sitting in judgement over an acquittal the Appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed."

##. Keeping in mind the above legal principles with regard to an appeal to be dealt with against the judgement by which accused is acquitted, we have considered the submissions made by both the parties in this appeal.

##. For convenience, first we will take a contention taken by Shri Yatin Soni, learned advocate for the appellant that the learned Judge of the trial Court has committed a gross error in arriving at a conclusion that the complainant being Inspector of Narcotics Department was neither empowered or authorised officer under Section 41 (2) of the NDPS Act. He has argued that in view of Section 42 (1), officer of Central Government and officer of State Government can be empowered to take action as stated in Sub-section (1) of Section 42.

As per Sub-section (1) of Section 42 of the NDPS Act any such officer being an officer superior in rank to a peon, sepoy or constable of the following departments can be empowered (a) Central Excise (b) Narcotics (c) Customs (d) Revenue Intelligence (e) or any other department of the Central Government or of the Border Security Force.

Likewise, any such officer being an officer superior in rank to a peon, sepoy or constable of the

following Departments of State Government can be empowered (a) Revenue (b) Drugs control (c) Excise (d) Police or any other department of a State Government.

For the aforesaid officers of either Central Government or a State Government can be empowered by respective Governments. In other words the officer of any of the Department stated hereinabove of Central Government can be empowered by the Central Government by passing General or Special order. Likewise, any officer of the State Government of any of the aforesaid departments can be empowered by the State Government by passing General or Special Order.

##. In view of aforesaid legal position, it is required to note as to whether the complainant, who was Inspector (Preventive) of Central Bureau of Narcotics was empowered by the Central Government or not. From the record of R & P of the case sent by trial Court, it appears that prosecution has produced one copy of Notification No. 6 of 1985 dated 14th November, 1985 published in Gazette of India (Page No. 22 of Appeal Memo). That Notification reads as follows :-

"Notin. No. 6/85 Dated 14.11.1985.

S.O. 822 (E) In exercise of the powers conferred by sub-section (1) of Section 42 of the Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby empowers the officers the officers of and above the rank of Sub-Inspector in the department of Narcotics and of and above the rank of Inspector in the department of Central Excise, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau to exercise the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorises the said officers to exercise the powers conferred upon them under Section 67."

Thereafter, Central Government, Ministry of Finance (Department of Revenue), authorised the Narcotic Commissioner, 19, The Mall Morar, Gwalior-6 (M.P.) vide letter No. F.No.664/79/87-OPIUM dated 16.11.1987 (At Page 20 with Appeal Memo) to define the jurisdiction of a particular officer or a class of officers. The relevant portion is at para 6 of the said letter, which reads as under :-

"Under the Narcotic Drugs and Psychotropic Substances Act, 1985, there is no specific provision requiring defining the jurisdiction of a particular officer or a class of officers. This has been left to the administrative heads. Moreover, the matter relating to defining of jurisdiction both on the basis of area or functions generally rests with the Head of the Department or any other officers exercising such powers of the Head of Department under the delegate authority. Therefore, the Narcotics Commission can authorise a particular set of officers to exercise power and perform functions in accordance with the notifications referred to above in a particular area which would be deemed to be his/their jurisdiction for purposes of Section 41 (2) and 42 (1) of the Narcotic Drugs and Psychotropic Substances Act, 1985."

In exercise of the powers conferred by the Central Government, the Narcotics Commissioner issued Notification dated 4.2.1998 by which, he defined the jurisdiction of the officer of the Narcotic Department empowered under Section 42 of the NDPS Act to exercise their powers for whole of India. That Notification dated 4.2.1988 which is at page No. 25 of Appeal Memo reads as follows :-

"MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
CENTRAL BUREAU OF NARCOTICS
OFFICE OF THE NARCOTICS COMMISSIONER OF INDIA
Gwalior - 474 006, the 4th February, 1988.

"S.O. No. NIB/1/88 (F. N. NIB 13 (6)/86WHEREAS a Central Government has empowered the officers of and above the rank of Sub-Inspector in the Department of Narcotics (hereinafter referred to as the 'officers') to exercise the powers and perform the duties specified in section 42 and 67 of the Narcotics Drug and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter referred to as the 'Act') by its notification No. 6/85 (F.No. 664/51/85-OPIUM) dated the 14th November, 1985.

2. NOW, therefore, the Narcotics Commissioner of India, Gwalior, in his capacity as Head of the Department and Centre Controlling Authority, hereby defines the jurisdiction of the said officers for exercise of powers and performance

of duties specified in Section 42 and 67 of the said Act, to be the whole of India.

S.O. No. NIB/2/88 I.No.NIB-13 (16)/86- WHEREAS the Central Government has empowered the officers and above the rank of Superintendent (being officers of Gazetted rank, and working in the executive field) in the Narcotics Department (hereinafter referred to as the 'officers') to exercise the powers specified in sub-sectino (2) of Section 41 of the Narcotic Drugs and Psychotropic Substances Act 1985 (61 of 1985) hereinafter referred to as the 'Act') within the area of their respective jurisdiction vide Notification No. 8/85 (F.No.664/54/85-OPIUM) dated the 14th November, 1985.

2. NOW, therefore, the Narcotics Commissioner of India, Gwalior, in his capacity as Head of the Department and Cadre Controlling Authority, hereby defines the jurisdiction of the said officers, for the exercise of the powers specified in sub-section (2) of Section 41 of the said Act, to be the whole of India.

D.CHAKRABORTY,
Narcotics Commissioner of India."

In view of aforesaid, three Notifications, it is crystal clear that the complainant, who at relevant point of time, was Inspector of Narcotics Department. First the Central Government had empowered all the Inspectors of Narcotics Department to perform their duties under Sections 42 and 67 of the NDPS Act and subsequently, the Narcotics Commissioner of India at Gwalior authorised all the said officers to exercise their powers specified in Sub-section 2 of Section 41 in area of the whole of India. In view of this, learned Judge of the trial Court has committed serious error in coming to the conclusion that the complainant had no authority to search and seize the contraband articles from the accused. Had he considered aforesaid three Notifications, possibly he would not have come to a conclusion that the complainant had no authority to search and seize the contraband articles. On that score, finding of the learned Judge is palpably wrong and it can be said to be a conclusion contrary to aforesaid notifications issued by the Central Government as well as the Commissioner of Narcotics, in exercise of their powers conferred under the NDPS Act.

##. Shri Yatin Soni, learned advocate for the appellant

has argued that the learned Judge of the trial Court did not consider the statement of accused recorded under Section 67 of the NDPS Act. That original statement is produced by prosecution at serial no 14 of list Ex.4. Complainant has referred to this document namely statement of accused mark 4/14, in para 3 of his deposition. He has deposed that he had recorded the statement of the accused at the place where the opium was seized and that he had recorded the statement of the accused as per the say of the accused and as per what was stated by the accused. During the course of recording evidence, he was shown the statement of the accused produced at mark 4/14. He has deposed that he identified his hand writing and his signature on it. Thereafter, learned Judge of the trial Court has made a note as follows :-

"Note: The question as to whether this document be given an exhibit or not will be decided at the time of final hearing of this case."

Shri Yatin Soni, learned advocate for the appellant has argued that learned Judge of the trial Court has not dealt with the statement mark 4/14 and therefore, the judgement can be said to be perverse judgement because the prosecution tendered an evidence of mark 4/14 and at the time of tendering such evidence, the learned Judge of the Trial Court gave assurance that that document would be considered in the Judgement.

Arguments of Shri Soni are contrary to Judgement. Mark 4/14 has been dealt with by learned Judge in para 19 of his judgement. Despite the fact that mark 4/14 has been considered by the learned trial Judge, we have considered this document mark 4/14 independently as if it is a proved document.

15.1 Looking to said statement mark 4/14 recorded by the complainant, accused - respondent no. 1 had stated that he "Kaniram Lalaji Banzara is resident of village Bisalvas Songira, Tehsil Neemuch, District Mandsaur (M.P.). He has further stated that 15 days before from the date of statement, one Bhikha Ratna Banzara aged about 30 years, resident of village Lodakheda, Tehsil Narayangarh, Dist.: Mandsaur (M.P.) having a lengthy height with fair skin and short moustache and wearing white cloth, had come to him at his village. He has further stated that said Bhika Ratna Vanzara asked him to go with him with opium to carry it upto Gujarat, for which, he would pay labour-charge of Rs.20/- alongwith expenses for food. He has then stated that thereafter,

that Bhikha Ratna came to him after about 4 to 5 days and asked him to go with him. He has further stated that he came in company of Bhikha Ratna upto road of Narayangarh and as it was a night time, they halted there near one well. He has further stated that one Chhoga Mohan Banzara aged about 25 years met them. That Chhoga Mohan Banzara gave two bags of opium to Bhikha Ratna Banzara and thereafter that Bhikha Ratna put that two bags of opium in his bag. He has further stated that thereafter in the morning of next day, they started their journey on foot and by walking they came to Ratanpur after about 5 to 6 days. He has stated that thereafter, they came to Ambaji by bus and thereafter, again they started to walk alongwith opium of Bhikha Ratna which was put in his bag, which he had hanged on his shoulder. He has further stated that that opium was of the ownership of Bhikha Ratna Banzara. He has further stated that when they came near railway line, police met them on the railway track and they asked them to halt there. As per the statement, police caught hold of him and Bhikha Ratna ran away from that place. In his statement, he has admitted that opium weighing about 8.600 grams was found from two bags, which were put in a big bag hanging on his shoulder.

15.2 In short, respondent no. 1 has admitted that opium was found from his bag but according to his statement that opium was of the ownership of Bhikha Ratna, who ran away from the place. From his statement, it is revealed that Bhikha Ratna had engaged accused for carrying opium for and on his behalf, for consideration of labour charge of Rs.20/- with expenses for meals. So, accused respondent no. 1 was merely a carrier.

15.3 To prove the case against accused, one has to prove that person was found with exclusive and conscious possession of the contraband article. Looking to the statement on which prosecution relies, accused was a simply labourer, who was asked to carry with him the opium for and on behalf of Bhikha Ratna. For that work, accused was to receive a labour charge of Rs.20/- and expenses for meals. So, possession of the opium cannot be said to be an exclusive possession of the accused. The possession of the opium was with him for and on behalf of Bhika Ratna. Shri J.M. Buddhbhatti, learned advocate for the respondent no. 1, has rightly argued that a person with exclusive possession of article can dispose of that article as per his own will. Here, in this case, accused - respondent no. 1 had no power or authority to dispose of that article entrusted by Bhikha Ratna because, he was simply a labourer engaged to carry that article with him for an on behalf of Bhikha Ratna.

15.4 Under the circumstances, even if, statement mark 4/14 is taken into consideration, this Court is of the view that possession of opium was not with accused, in his exclusive possession because he had no power, authority or right to dis-possess that article as per his own will. Ultimately, the full control over the opium was of Bhikha Ratna and not of accused himself. Under these circumstances, even if statement mark 4/14 is taken into consideration, it leads nowhere. It only proves that possession of opium was with accused for and on behalf of Bhikha Ratna Banzara. Respondent No. 1 had no control over the opium, which was put in his bag.

15.5 In view of discussion made hereinabove, the statement mark 4/14 will not prove the case against accused. The prosecution was required to prove that accused was found with exclusive and conscious possession of contraband article. Here in this case, exclusive possession is not proved.

##. One of the ground on which, accused has been acquitted is to the effect that the complainant has deposed in his evidence as follows :-

> "We then took two samples each of 30 grams from each rexine bag and we then packed and sealed all these samples separately. We had packed each samples with a piece of paper. In that piece of paper, we had kept empty packet of cigarette. We then wrapped that empty packet of cigarette in a piece of paper."

So, as per the evidence of complainant, the representative samples were packed in empty cigarette packets. Shri Buddhbhatti, learned advocate for the appellant has argued that if we look Report Ex.21 of Chemical Examiner, we find that representative samples were found from match box. Relevant portion of report Ex. 21 reads as follows :-

> "On opening the sample packets, Black pasty material with odour of opium was found kept inside match box, which was wrapped in polythine sheet."

Thus, the Chemical Examiner received a representative sample inside match box, which was wrapped in polythine sheet. As per the evidence of complainant, he packed the representative sample in empty cigarette packet and it was wrapped in piece of paper. So on two

counts, there is a contradictory evidence. One for "empty cigarette packet" and other for "piece of paper". As per the Report Ex.21 of Chemical Examiner, representative samples were found from the empty match boxes wrapped in polythine sheets. In view of this serious discrepancy, it creates a doubt and the learned Judge of the Trial Court has given a benefit of doubt on counts including this count of discrepancy with regard to packing. When from evidence, if two possible views can be taken, then view in favour of accused should be taken, while deciding the case against accused. The learned Judge of the trial Court, who had an opportunity to notice the demeanour of the witnesses, has come to a conclusion that a reasonable doubt arises from the evidence on record. He has based his conclusion on the fact that though, four representative samples each of 30 grams were prepared by the complainant, he could not have handed over the opium weighing 8.600 grams in the Deesa (Rural) police station. By deducting 120 grams from the total weight of the opium, the complainant could have produced opium weighing 8.480 grams in police station. Looking to contradictory evidence with regard to packing and evidence of Chemical Examiner with regard to article found from the match box, wrapped in polythine sheet, a man of reasonable prudence can doubt as to whether in fact same representative samples were sent to chemical examiner or not. It may be noted that complainant prepared representative samples on the date of incident i.e. on 06.06.1988 and out of four samples, he kept with him two samples and thereafter, after reaching to his head quarter on 9.6.1988 he handed over that two samples to District Opium Officer. As per evidence on record, the District Opium Officer sent that two representative samples to the Laboratory under his covering letter on 10.06.1988. Thus, representative samples remained in custody of the complainant during the period from 06.06.1988 to 09.06.1988. Looking to the discrepancy in evidence, a possibility of tempering with representative samples by the complainant or any other persons cannot be ruled out and therefore, the learned Judge of the trial Court has rightly entertained a doubt for the representative samples examined by the Chemical examiner. Thus the learned Judge of the trial Court has rightly given benefit of doubt to the accused.

##. We endorse the reasons given by the learned Judge of the trial Court for giving benefit of doubt to accused on the ground of tempering with representative samples, which remained with complainant for four days. On this count, the finding arrived at by the learned Judge of the trial Court can not be said to be a wrong decision.

##. The most important contention taken by Mr. Buddhbhatti, learned advocate for the appellant is to the effect that prosecution has not proved beyond reasonable doubt that article found from the possession of accused was opium. The prosecution relies on report of examination of contravened opium dated 21.7.1988. It is at Ex.21. Report of Chemical Examination is as under :-

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	Mark L.R.95 (I)	Mark L.R.95 (2)
1. Consistence	----------	67.00' 78.00'
2. Morphine by B.P.Method on dry matter.	05.71%	03.61%
3. Each of the two samples, is found by qualitative and quantitative analysis to be opium, within the meaning of Section 2 (XV) of the Narcotic drugs and Psychotropic Substances act, 1985 (61 of 1985)		

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If, we peruse the aforesaid report, we find that Assistant Chemical Examiner has not stated specifically as to which scientific tests were conducted and what were the results derived therefrom. Test of Morphine by B.P. Method on dry matter was carried out for two samples. From the aforesaid report, it cannot be said that it is full and complete report disclosing the scientific tests or experiments carried out by the Assistant Chemical Examiner. The Assistant Chemical Examiner has come to a conclusion that by qualitative and quantitative analysis, article was found to be opium within the meaning of Section 2 (XV) of the NDPS Act (61 of 1985). In view of this, the Assistant Chemical Examiner must have performed some qualitative and quantitative tests to come to a conclusion that particular substance is opium. He has not stated what were the results of that tests carried out by him to come to a conclusion which he has stated in para 3 of aforesaid report.

18.1 Shri Buddhbhatti, learned advocate for the appellant has placed reliance on the case of MAHMAD HANIF SHAIKH IBRAHIM VS. STATE OF GUJARAT, reported in 1994 (2) 35 (2) GLR p.1191, wherein, it has been stated by Division Bench of this Court as follows :-

"The Public Analyst must specifically mention the scientific tests conducted and results derived therefrom. If in hurry or by chance or haste or

> through oversight, the scientific tests are not mentioned in the report, the same is fatal to the prosecution and any ipse-dixit by way of reporting cannot be accepted in criminal trial as it has no probative evidentiary value in the eye of law. The report of the public analyst containing bare opinion, without there being any full and complete data disclosing the tests or experiments performed by him, cannot be attached any probative, evidentiary value to be used against the accused for recording the order of conviction and sentence. The practice adopted by public analyst in such serious cases in not following the rules is highly deprecated."

The aforesaid ratio laiddown in case of Mahmad Hanif Shaikh Ibrahim Vs. State of Gujarat has been followed by the Division Bench of this court in case of AMRABHAI RANCHHODBHAI BHARWAD VS. STATE OF GUJARAT, reported in 2001 (2) Vol.XLII (2) GLR p.1140.

##. Here in this case also, the report Ex. 21 does not disclose the tests carried out for quantitative and qualitative analysis of the substances. It also does not disclose the result of said tests carried out for analysis. In view of this, report Ex. 21 has no probative evidentiary value. If we take out Ex. 21 from the evidence, there is no evidence to prove the fact that article which was found from the possession of the accused was opium within the meaning of Section 2 (XV) of the NDPS Act. In view of this, the prosecution has totally failed to prove the case against the accused, for which, a charge has been framed.

##. We have considered the reasons given by the learned Judge of the trial Court for giving a benefit of doubt to the accused. We endorse the said grounds except the ground for vesting of the powers under Section 41 (2) and 42 (1) of the Act with the complainant.

##. In the net result, this appeal deserves to be dismissed and accordingly, it is dismissed. The judgement at Ex. 79 dated 24.1.1992 rendered in Sessions Case No. 173 of 1990 by the learned Sessions Judge, Banaskantha District Palanpur is confirmed for the reasons stated by us hereinabove. The personal bond to the extent of Rs.1000/- (Rs. One Thousand only) furnished by respondent no. 1 pursuant to order of this Court dated 3.3.1994 is hereby cancelled.

(D.K.Trivedi,J.)

(H.H. Mehta, J.)

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